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Plaintiffs' Co-Lead Class Counsel

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

AARON SENNE, et al., Individually and on
Behalf of All Those Similarly Situated;

Plaintiffs,

vs.

OFFICE OF THE COMMISSIONER OF
BASEBALL, an unincorporated association
doing business as MAJOR LEAGUE
BASEBALL; et al.;

Defendants.

CASE NO. 3:14-cv-00608-JCS (consolidated
with 3:14-cv-03289-JCS)

CLASS ACTION

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION TO STRIKE DEFENDANTS'
DAUBERT MOTIONS AND IMPROPER
REBUTTAL REPORT; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: February 11, 2022
Time: 9:30 a.m.
Ctrm.: F

NOTICE OF MOTION AND MOTION

Please take notice that Plaintiffs, on behalf of themselves and the certified classes and FLSA collective, will and hereby do move the court to strike or take other appropriate remedial action relating to: (1) Defendants' Motion to Exclude Plaintiffs' Expert Declarations and Testimony of J. Michael Dennis, Ph.D. (ECF No. 969); (2) the Declaration of Eugene P. Ericksen in Support of Motions to Exclude Plaintiffs' Expert Declarations Reports and Testimony of J. Michael Dennis, Ph.D. and Brian Kriegler, Ph.D. (ECF No. 969-12); and (3) Defendants' motions to exclude the testimony of Dr. Dennis (ECF No. 969), Dr. Kriegler (ECF No. 971), and Dr. Groshen (ECF No. 987). Plaintiffs ask that this Motion be heard on February 11, 2022 at 9:30 a.m., or at the earliest date that the Court deems this Motion suitable for resolution with or without oral argument at the Court's discretion, (L.R. 7-1(b)), in Courtroom F, 15th Floor of the U.S. District Court for the Northern District of California, San Francisco Division, before the Honorable Joseph C. Spero.

This Motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities, the records on file in this action, and upon additional argument as may be presented at or before the hearing on this Motion.

DATED: December 8, 2021

Respectfully submitted,

/s/ Bobby Pouya

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs file this motion based on Defendants’ multiple violations of the Federal Rules of Civil Procedure, Civil Local Rules, and this Court’s Orders in connection with their motion for partial summary judgment and three new *Daubert* motions.

First, Defendants have impermissibly filed a second *Daubert* motion regarding the final report and Main Survey of Plaintiffs’ survey expert Dr. J. Michael Dennis. *See* ECF No. 969 (“Second Dennis *Daubert*”). Plaintiffs disclosed Dr. Dennis’s final report and Main Survey on August 4, 2016 (ECF No. 696). Defendants filed multiple reports in opposition and moved to exclude the final report and Main Survey. The Court applied a full *Daubert* standard and denied the motion to exclude (ECF No. 687). Defendants did not seek leave to move for reconsideration of that order, and conceded that the survey satisfied the requirements of *Daubert* in briefing to the Ninth Circuit Court of Appeals. As recently as the August 27, 2021 hearing, the Court reminded Defendants that they were not to attempt “another free shot” at Dennis’s report or engage in further “criticism of the underlying methodology or validity of the survey.” Aug. 27, 2021 Hr’g Tr. 13 (ECF No. 1007). Defendants have done just that. Their Second Dennis *Daubert* filed four years later, violates the Court’s instructions, constitutes an improper motion for reconsideration in violation of Civil Local Rule 7-9 and Rule of Civil Procedure 59(e), and should be stricken.

Second, Defendants have improperly filed a new rebuttal report by their survey expert Dr. Eugene Ericksen in conjunction with the Second Dennis *Daubert*. The Court’s operative case management order directs that rebuttal reports be limited to experts who had not previously been rebutted. *See* ECF No. 843 at 2. This order precluded a rebuttal report directed to Dr. Dennis’s August 2016 report and main survey, which were rebutted by Dr. Ericksen on September 14, 2016 (ECF No. 726) and October 28, 2016 (ECF No. 761). Defendants were obviously aware of this order and did not file a report by Dr. Ericksen when rebuttal reports were due. That Defendants have titled Dr. Ericksen’s new rebuttal report a “declaration” does not change what it is: an improper, late-filed rebuttal report. Defendants have disregarded the case management order, and Dr. Ericksen’s new report should be stricken.

Finally, Defendants have improperly filed three separate *Daubert* motions directed at Plaintiffs' experts, in violation of the Court's order requiring the filing of a single combined *Daubert* motion absent leave of court. ECF No. 843 at 2. Their three briefs totaling 58 pages substantially exceed Civil Local Rule 7-2(b)'s 25-page limit on motions and should be stricken.

II. LEGAL ARGUMENT

A. Defendants' Second Dennis *Daubert* Violates the Federal Rules, Local Rules, and This Court's Orders

The Second Dennis *Daubert* is an improper motion for reconsideration in violation of the local rules, the federal rules, and this Court's clear instructions. In its original order on class certification, the Court reviewed the sufficiency of Dr. Dennis's pilot survey, which was meant to test the viability of conducting a main survey. *See* July 21, 2016 Order at 97, ECF No. 687. After that first class certification order, Plaintiffs filed a timely motion for reconsideration in August of 2016, under Civil Local Rule 7-9 and Federal Rule of Civil Procedure 59(e). In support of that motion, Plaintiffs submitted Dr. Dennis's final report and the results of the Main Survey. *See* ECF No. 696. In response, Defendants filed multiple rebuttal reports and a *Daubert* motion to exclude the Main Survey and opinions of Dr. Dennis on September 14, 2016. *See* ECF No. 724.

On March 7, 2017, the Court denied Defendants' first *Daubert* motion challenging Dr. Dennis and the Main Survey. *See* ECF No. 782. The Court engaged in a full *Daubert* analysis that considered Dr. Dennis's proposed methodology as well as the results of the Main Survey, applying established standards regarding the admissibility of survey evidence pursuant to *Daubert*. *See* ECF No. 782 at 39-48.

Defendants did not move for reconsideration of the Court's March 7, 2017 Order. Moreover, in their Rule 23(f)/28 U.S.C. § 1292(b) appeal of the Court's March 7, 2017 Order, Defendants did not challenge the Court's ruling that Dr. Dennis's Main Survey was admissible under *Daubert*. Defendants did, however, put the survey at issue in the appeal, arguing that while the Main Survey

1 “cleared the low bar of admissibility under *Daubert*,”¹ class certification required a “heightened
2 ‘admissibility-plus’ standard.”² Regarding the Main Survey, the Ninth Circuit stated:

3 Because defendants do not challenge the district court’s ruling on
4 admissibility under *Daubert*, the defects they have identified with
5 the Main Survey could only have defeated certification upon a
6 conclusion that all of the representative evidence offered—the Main
7 Survey, schedules, testimony, and the like—could not have
8 ‘sustained a reasonable jury finding as to hours worked in each
9 employee’s individual action.’

10 *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 945 (9th Cir. 2019), *cert. denied*, 141
11 S. Ct. 248, 208 L. Ed. 2d 22 (2020), *citing* *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 136 S.
12 Ct. 1046-47 (2016).

13 On remand, the Court made it clear, and Defendants recognized, that they had lost their
14 *Daubert* challenge against Dr. Dennis. This fact was most recently acknowledged on the record
15 during the August 27, 2021 status conference, which included the following exchange between the
16 Court and defense counsel:

17 THE COURT: You’re not saying that you get another free shot at
18 the – at Dennis’s report because you’re giving your rebuttal to
19 Kriegler.

20 MS. BLOOM: No, I don’t see that that – we’re not getting another
21 free shot at Dennis’s report. That’s correct.

22 THE COURT: Right.

23 MS. BLOOM: That’s correct.

24 THE COURT: Right. It’s got to be a criticism of how Kriegler uses
25 the report, perhaps, or something like that, but not some criticism of
26 the underlying methodology or validity of the survey.

27 See Aug. 27, 2021 Hr’g Tr. 13, ECF No. 1007. The Court further warned Defendants to “be careful”
28 about making additional attacks on Dr. Dennis. *Id.* at 15. Just a month after this exchange,
29 Defendants filed the Second Dennis *Daubert*.

30 ¹See ECF No. 1021-2 at 3 (Excerpt from Defendants-Appellees/Cross-Appellants’ Consolidated
31 Principal and Response Brief filed Dec. 22, 2017, in *Senne v. Kansas City Royals Baseball Corp.*,
32 Appeal Nos. 17-16245, 17-16267, 17-17276 (9th Cir.) (Dkt No: 38)).

33 ² *Id.* at 4.

1 The Second Dennis *Daubert* violates the Court’s clear instructions prohibiting the filing of
 2 the motion, as well as the requirements of Civil Local Rule 7-9 and Fed. R. Civ. P. 59(e) governing
 3 motions for reconsideration. Specifically, Defendants have failed to seek leave of court to file the
 4 motion as required by Local Rule 7-9. Defendants have failed to make a “specific showing” of
 5 reasonable diligence in bringing the motion. *See* Civil L.R. 7-9(a). Nor have Defendants shown that
 6 there is a material difference in fact or law from that originally presented to the court, that new
 7 material facts have emerged, or that the court manifestly failed to consider material facts or
 8 dispositive legal arguments. *See* Civil L.R. 7-9(b). As set forth in Plaintiffs’ opposition to the Second
 9 Dennis *Daubert* (ECF No. 1021), which is incorporated by reference herein, these deficiencies
 10 require that the motion be denied on the merits.

11 Furthermore, in light of Defendants’ total disregard of the procedural history of the case,
 12 Local Rule 7-9, Fed. R. Civ. Proc. 59, and the Court’s clear instructions not to file a Second Dennis
 13 *Daubert*; the Court should strike and/or take other remedial action as appropriate. *See* Civ. L. R. 7-
 14 9(c) (“[A]ny oral or written argument made by the applying party in support of or in opposition to
 15 the interlocutory order which the party now seeks to have reconsidered...shall be subject to
 16 appropriate sanctions.”).

17 **B. The New Rebuttal Report Filed by Dr. Ericksen Violates the Federal Rules**
 18 **and This Court’s Orders**

19 Alongside their Second Dennis *Daubert*, Defendants filed a new report from their survey
 20 expert, Dr. Eugene Ericksen. Although styled as a “declaration,” it is a new rebuttal report aimed at
 21 the 2016 final Dennis report and Main Survey. This is in violation of the Court’s case management
 22 order, which specifically limited supplemental expert reports to: “an expert report in rebuttal to the
 23 updated Kriegler report” or “expert disclosures in rebuttal to opening expert reports not previously
 24 rebutted.” ECF No. 843 at 2.

25 This order specifically barred Dr. Ericksen from submitting a further rebuttal report to the
 26 final Dennis report. Dr. Dennis’s final report and Main Survey were disclosed concurrently with
 27 Plaintiffs’ Motion for Reconsideration on August 4, 2016. ECF No. 696. Dr. Ericksen already filed
 28 two rebuttal reports in response, to the final Dennis report on September 14, 2016 (ECF No. 726)

1 and on October 28, 2016 (ECF No. 761). Dr. Dennis has not conducted further studies or submitted
2 new reports since 2016.

3 It is telling that on the recent deadline for filing rebuttal reports, Defendants did not submit
4 anything from Dr. Ericksen. Instead, they had their labor economist, Dr. Denise Martin, reference
5 Dr. Ericksen's opinions and offer opinions regarding the admissibility of the survey that fall outside
6 of her expertise (and likewise attempt to circumvent the Court's order on new criticisms aimed at
7 the Main Survey).³

8 Now, in another attempt to skirt the Court's directives, Defendants have filed a new rebuttal
9 report Dr. Ericksen, labeled as a "declaration" in support of the Second Dennis *Daubert*. Regardless,
10 of the new moniker, the new Ericksen report is clearly a rebuttal aimed at Dr. Dennis final report
11 and Main Survey. Indeed, a number of Dr. Ericksen's new opinions were (improperly) adopted and
12 presented by Dr. Martin in her rebuttal report. *Compare* Ericksen Decl. (ECF No. 969-12); *with*
13 Martin Supp. Report (ECF No. 985-6). The new Ericksen rebuttal report therefore violates the
14 Court's case management order, as well as Rule of Civil Procedure 26(D)(ii), which requires rebuttal
15 reports to be filed within 30 days of the other party's disclosure absent a court order.

16 Defendants should not be permitted to argue that their filing of a new Ericksen rebuttal report
17 is harmless. Plaintiffs have suffered prejudice by Defendants' improper filing of the new Ericksen
18 "declaration." Because it was filed after the close of expert discovery (and long after the cut-off for
19 the disclosure of expert rebuttal reports), Plaintiffs did not have an opportunity to fully rebut Dr.
20 Ericksen's opinions or question him regarding the substance of his "declaration" at his deposition.
21 In fact, when Dr. Ericksen was questioned at his deposition about whether he had any additional
22 opinions, defense counsel asserted the attorney-client privilege and instructed Dr. Ericksen not to
23 answer. *See* Ericksen Dep. at 27-28, attached as Ex. A to Pouya Decl. For these reasons, Dr.
24 Ericksen's new "declaration" (rebuttal report) is improper and should be stricken.⁴

25 _____
26 ³ Plaintiffs have moved to exclude these opinions by Dr. Martin, which fall outside of her expertise.
27 *See* ECF No. 988 at 13-16.

28 ⁴ To the extent that the Court decides to accept Dr. Ericksen's new rebuttal report and finds any of
the opinions therein to be persuasive, Plaintiffs reserve the right to reopen Dr. Ericksen's deposition
and to file a response by Dr. Dennis thereto.

C. **Defendants' Have Improperly Filed Three *Daubert* Motions in Violation of This Court's Case Management Order**

On November 17, 2020 this court issued a superseding case management order that states: "Without leave of Court no party may file more than ... one (1) *Daubert* motion, addressing any number of expert witnesses, to be heard at the same time as dispositive motions." See ECF No. 843 at 2-3. Absent leave of Court, such motions are limited to 25 pages. See N.D. Cal. L.R. 7-2(b). Defendants violated the Court's order and Local Rule 7-2(b) by filing three separate *Daubert* motions against Plaintiffs' experts Dr. Dennis (ECF No. 969), Dr. Brian Kriegler (ECF No. 971), and Dr. Erica Groshen (ECF No. 987)), totaling 58 pages, without leave of court.⁵ Plaintiffs, on the other hand, filed a single combined *Daubert* motion directed at Defendants' experts (Dr. Denise Martin and Dr. Jonathan Guryan (ECF No. 988), totaling 22 pages. Defendants' multiple motions needlessly and improperly increased the amount of briefing regarding these *Daubert* motions. The Court should exercise its discretion to strike the multiple *Daubert* motions filed by Defendants in violation of its order, or otherwise disregard the portions that exceed the applicable page limits set by Local Rule 7-2.

III. **CONCLUSION**

Defendants' have blatantly ignored this Court's case management orders, the Civil Local Rules, and Federal Rules of Civil Procedure in connection with their motion for partial summary judgment and three new *Daubert* motions. The Court should strike these filings or take other remedial actions as appropriate.

DATED: December 8, 2021

Respectfully submitted,

/s/ Bobby Pouya

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⁵ The motion directed to Dr. Dennis is 25 pages long, the Kriegler motion is 18 pages, and the Groshen motion is 15 pages, totaling 58 pages.

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